

No. 20,358
United States Court of Appeals
For the Ninth Circuit

FLYING TIGER LINES, INCORPORATED,
and
EMPLOYERS MUTUAL LIABILITY INSUR-
ANCE COMPANY OF WISCONSIN,
Appellants,
vs.

DAVID R. LANDY, Deputy Commissioner
for the 13th Compensation District,
and

PETER GREGORY THOMAS, MAUREEN
ALTAIR THOMAS, and TERRY AVA
THOMAS, Minor Children of Gregory
Peter Thomas, Deceased,
Appellees.

FEB 10 1967

APPELLANTS' OPENING BRIEF

HANNA & BROPHY,
444 Market Street,
San Francisco, California 94104,
Attorneys for Appellants.

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Appellees.

APPELLANTS' OPENING BRIEF

STATEMENT IN RESPECT TO JURISDICTION

This appeal grows out of the filing of an application for benefits under the Defense Bases Act, United States Code, Title 42, sections 1651-54. The application was filed on behalf of the appellees, Peter Gregory Thomas, Maureen Altair Thomas and Terry Ava Thomas, minor children of Gregory Peter Thomas,

deceased, with the Bureau of Employees' Compensation, United States Department of Labor, on the ground that said appellees, as dependents of the decedent Gregory Peter Thomas, were entitled to the death benefits provided by the Longshoremen's and Harbor Workers' Compensation Act on account of his death.

Subsection (b) of section 1653 of United States Code, Title 42, provides as follows in respect to jurisdiction:

(b) Judicial proceedings provided under sections 18 and 21 (33 U. S. Code 918 and 921) of the Longshoremen's and Harbor Workers' Compensation Act in respect to a compensation order made pursuant to this Act (42 U. S. Code 1651-1654) shall be instituted in the United States District Court of the judicial district wherein is located the office of the deputy commissioner whose compensation order is involved if his office is located in a judicial district, and if not so located, such judicial proceedings shall be instituted in the judicial district nearest the base at which the injury or death occurs.

The order involved in this case was issued by the Deputy Commissioner of the 13th Compensation District, with headquarters in San Francisco; and therefore jurisdiction to review the orders issued by such deputy commissioner resides in the United States District Court for the Northern District of California, Southern Division.

Jurisdiction of this Court upon appeal is invoked under section 128(a) of the United States Judicial Code (28 U. S. Code 225).

STATEMENT OF THE CASE

The application for benefits made on behalf of the appellees Thomas to the Deputy Commissioner of the 13th Compensation District was made after these same appellees had already applied to the Industrial Accident Commission of the State of California for the granting of a death benefit on account of the demise of their father under the workmen's compensation laws of California. A hearing had been held before a referee of the California Industrial Accident Commission, the matter was submitted for decision, and the Commission then made its award of death benefits to said appellees.

The litigation before the California Commission involved, as defendants, the same parties as in this matter, to wit, the Flying Tiger Lines, Inc. and its workmen's compensation insurer, the Employers Mutual Liability Insurance Company of Wisconsin; and the latter company was ordered to pay, and did pay, the benefits awarded to appellees by the California Commission.

After all of the foregoing had occurred, there was filed on behalf of the same appellees an application for death benefits on account of their father with the Bureau of Employees' Compensation. A hearing on said application was scheduled by that agency and was held in July, 1964 at Los Angeles, California, before David R. Landy, a deputy commissioner of said Bureau of Employees' Compensation, one of the appellees herein. Thereafter, an award of a death

benefit in favor of the appellees Thomas was made by the deputy commissioner.

Within 30 days thereafter, as required by U. S. Code, Title 33, section 921(a), the appellants herein filed their complaint for injunction in the District Court of the United States, Northern District of California, Southern Division. The District Court, acting through District Judge Albert C. Wollenberg, issued an order on May 24, 1965, granting summary judgment in favor of the appellees.

STATEMENT OF FACTS INVOLVED

The decedent Gregory Peter Thomas was employed as an airline pilot by the Flying Tiger Lines, Inc., an appellant herein. The latter, at all times pertinent hereto, was insured as to liability for workmen's compensation benefits by the Employers Mutual Liability Insurance Company of Wisconsin, also an appellant herein.

In the early part of March, 1962, military authorities of the United States were desirous of having certain military personnel transported from Travis Air Base, in California, to the Tan Son Nhut Air Base, near Saigon, South Vietnam. A contract was entered into between the United States Military Air Transport Service (MATS) and Flying Tiger Lines, Inc. to cover the transportation of the personnel (96 persons) in question, and Flying Tiger Lines, Inc. accordingly supplied a plane and crew of 11 to carry

out the provisions of the contract. One of the crew was Gregory Peter Thomas, a pilot who had been hired in, and resided in, California.

The plane was a Constellation Aircraft, number 69213. It flew from Travis Air Base to the Island of Guam, and on the evening of March 15, 1962 left Agana, Guam, headed for Clark Air Base, Manila, Philippine Islands. The plane disappeared while en route to the latter point. An intensive sea and air search failed to turn up any evidence of the plane, debris or survivors; and military authorities concluded that the plane had crashed into the ocean, resulting in the death of all 107 persons aboard.

A petition for determination of death of the decedent, Gregory Peter Thomas, was filed in the Superior Court of Los Angeles County, pursuant to which the Court, on September 28, 1962, issued its order establishing the fact of death (Exhibit H at the hearing before the deputy commissioner). Subsequently there was issued an official "Court Order Delayed Certificate of Death".

Thereafter, the widow and children of decedent Gregory Peter Thomas filed a claim for death benefit with the Industrial Accident Commission of California. A hearing was held before Referee Leon M. Berger who, on March 18, 1963, filed his "Order Dismissing Party Applicant and Findings and Award". This Award granted the appellees Thomas a death benefit of \$17,500.00, payable to their guardian ad litem and trustee at the rate of \$70 weekly. The decision read as follows:

“Application having been filed herein, all parties having appeared and the matter having been regularly submitted, the Honorable Leon M. Berger, Referee, finds, awards and orders as follows:

Findings of Fact

“1. Gregory Peter Thomas, died on March 16, 1962 as a proximate result of injury on the same day arising out of and occurring in the course of his employment by The Flying Tiger Line, Inc., whose insurance carrier was Employers Mutual Liability Insurance Company of Wisconsin.

“2. Employee left surviving him, wholly dependent, Peter Gregory Thomas, Maureen Altair Thomas and Terry Thomas, wholly dependent minor children.

“3. No burial expense was incurred by the applicants.

“4. Doreen M. Thomas is neither a necessary nor proper party applicant herein.

“5. The reasonable value of the services of applicant's attorney is \$750.00.

Award

“Award Is Made in favor of Peter Gregory Thomas, Maureen Altair Thomas and Terry Thomas, minors against Employers Mutual Liability Insurance Company of Wisconsin, of \$17,500, payable as follows:

“To Doreen M. Thomas as Guardian ad Litem and Trustee for Peter Gregory Thomas, Maureen Altair Thomas and Terry Thomas, minors, \$3,710.00 payable forthwith and \$70.00 weekly thereafter beginning March 24, 1963, until paid,

together with interest provided by law; less \$750.00 payable to J. Wallace McKnight, whose lien is hereby allowed."

After weekly payments aggregating \$4,270.00 had been made by the plaintiff-carrier herein, and pursuant to a request for lump sum payment, the Industrial Accident Commission issued an order commuting the unpaid balance of \$13,230.00 to its then present value of \$12,549.91, payable to the guardian ad litem and trustee of the three minor children of the decedent, who are named as defendants in this proceeding. Payment was then made in accordance with this order by the plaintiff-carrier, with the result that total payments under the Commission award and order amounted to \$16,819.91.

In April, 1963, officials of the Bureau of Employees' Compensation, having learned of the casualties occurring on March 16, 1962, made a demand upon the plaintiff-carrier herein for the filing of reports covering the deaths of members of the crew of the missing plane, on pain of the imposition of a penalty for failure to do so, under section 30(e) of the Longshoremen's and Harbor Workers' Compensation Act. The requested reports were filed under protest.

The foregoing action led to the filing, on July 29, 1963, of a claim on behalf of the three defendant minors before the deputy commissioner of the 13th Compensation District, on the theory that said deputy had jurisdiction of the claim under provisions of the Defense Bases Acts (42 U.S.C.A. 1651-1654).

The matter was set for hearing at Los Angeles, California, on July 7, 1964, and was heard by Deputy Commissioner Landy. Issues raised included (1) Fact of death, (2) Dependency of the minor children, (3) Election of remedies, and (4) Jurisdiction on the ground that the Defense Bases Acts do not apply. Counsel for the plaintiff-carrier herein asked for credit in the full sum of \$17,500.00, on the ground that this was the amount awarded under the State law, which award had been satisfied by the commutation to a present value of \$16,819.91.

At the time of hearing, there was placed in the record a copy of Contract No. AF 11(626)-389 between the Military Air Transport Service and the Flying Tiger Lines, Inc., a document of 146 pages covering the general agreement for the rendition of transportation of personnel by Flying Tiger Lines, Inc., with provision for individual service orders to be issued covering each separate flight to be made (see Exhibit J).

Marked as Exhibit K was a copy of the "service order" covering the flight in question. It was dated March 2, 1962, and was numbered "29." It called for the transporting of 99 Pax (Passengers?) at a unit price of \$334.698, total amount of \$33,135.10, from Travis Air Force Base in California to Tan Son Nhut Air Base, Saigon, Vietnam, via Clark Air Base, Manila, about March 13 or 14, 1962. It bore a notation that "The transportation ordered herein is necessary to fulfill unforeseen military requirements as to which time is of the essence."

Following the hearing on July 7, 1964, before deputy commissioner Landy, the latter issued, under date of August 7, 1964, his Compensation Order and Award of Death Benefits. Its "Findings of Fact" included the following:

"1. That on the 15th day of March, 1962, the deceased employee above named was in the employ of the employer above named as an Airline Pilot on a Public Works Contract number A.F. 11 (626)-389 to transport Army personnel outside the Continental United States to the Pacific Compensation District established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act as extended by the Acts of Congress of August 16, 1941 and December 2, 1942 (42 U.S.C.A. 1651-1654) and that the liability of the employer for compensation under said Acts was insured by the Employers Mutual Liability Insurance Company of Wisconsin."

The Award granted the minor children benefits at the rate of \$68.25 a week, accrued from March 16, 1962 through July 7, 1964 in the amount of \$8,238.75, together with \$68.25 a week payable on a continuing basis, "subject to the limitations of the Act in respect to age and continuing dependency." The Award contains the following provision:

"The carrier having paid the sum of \$16,819.91, which amount is \$8,581.16 in excess of the death benefits accrued to July 7, 1964 inclusive, shall be given credit for such payment as it may extend into the future. . . ."

Under the terms of this Award, no further benefits will be payable to the minor dependents until some time in the year 1966.

It is the position of the plaintiffs herein that the Compensation Order and Award of Death Benefits is not in accordance with law and should be vacated and set aside by this Honorable Court.

QUESTIONS PRESENTED

(1) Did the defendant deputy commissioner have jurisdiction under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as extended by those of the Defense Base Act, to make an award of benefits to the minor children named as defendants herein?

(2) Was the prior decision of the State Industrial Accident Commission on the same issues *res judicata*?

(3) In any event, was the carrier entitled to full credit, against any award of federal benefits, for the amount of the prior state commission award, when the latter had been paid in full?

ARGUMENT

I.

THE PROVISIONS OF THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, AS EXTENDED BY THE DEFENSE BASE ACT, DO NOT CONFER JURISDICTION OVER THIS CASE UPON THE FEDERAL DEPUTY COMMISSIONER.

(1) There is no jurisdiction under provisions of the Longshoremen's Act itself.

Coverage under the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C.A. 901-950) is strictly limited by its own provisions. Benefits are payable only for the results of an injury occurring on the navigable waters of the United States, *and* if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. Moreover, the Act excludes coverage for injuries to a member of the crew of any vessel. 33 U.S.C.A. 903.

The employee's death in the present case fails to meet any of these statutory requirements. It did not result from an injury occurring on navigable waters of the United States, but rather in waters lying between Guam and the Philippine Islands. Moreover, the situation was one in which benefits could be validly provided under State law; indeed, the claim was fully adjudicated under the compensation law of the State of California, an award of benefits was made by the Industrial Accident Commission of California, and full payment under the award was made by the employer's insurer, one of the plaintiffs herein. And fi-

nally, the decedent, being a vessel crew member, was not within the coverage of the Act.

It will be conceded, we are sure, that so far as the provisions of the Longshoremen's Act itself are concerned, there is no jurisdiction over this matter. Clearly, the deputy commissioner's power to act must be found, if at all, in the provisions of the Defense Base Act (42 U.S.C.A. 1651-1654).

(2) There is no jurisdiction under provisions of the Defense Base Act.

- (a) It is debatable whether the employer's contract with the government was a "public work" contract within the meaning of the Defense Base Act.

Jurisdiction of the deputy commissioner under provisions of the Defense Base Act is dependent upon injury or death occurring during employment under a contract performed for the purpose of engaging in "public work" as defined by 42 U.S.C.A. 1651 (b) (1). As defined by that subsection of the Act, "'public work' means any . . . project . . . involving construction, alteration, removal or repair for the public use of the United States or its allies . . ." Full text of this subdivision will be found on page 5 of the "Memorandum On Behalf Of Defendant Deputy Commissioner" at lines 25-30.

Rather clearly, the employer's contract in the present case is *not* one "involving construction, alteration, removal or repair." The language of the section goes on to mention certain other projects and operations; but it is a standard rule of construction that where general words follow the enumeration of particular

classes of things, the general words will be construed as applicable only to things of the same general nature or class as those enumerated. *Pasadena University v. Los Angeles County*, 190 Cal. 786; *In re Cook*, 67 C.A. 2d 20. This is the rule of *ejusdem generis*, which is founded on the idea that if the general words were intended to prevail in their full and unrestricted sense, there would be no need for the special enumeration of the particular classes. *In re Johnson*, 167 Cal. 142.

Applying here the rule of *ejusdem generis*, to the definition of "public work" found in subsection 1651 (b)(1), the employer's contract must involve "construction, alteration, removal or repair." There is no evidence in this case that the contract involved any of such elements; therefore, the deputy commissioner's decision is erroneous as a matter of law.

It has been held that an airplane pilot employed by an airline company was not engaged in "public work" within the meaning of the Defense Base Act, so as to limit his remedy to that provided thereunder, because of a contract between his employer and the United States for air transport services and his employment in performance of such services. *Walker v. American Overseas Airline, Inc.*, 90 N.Y.S. 2d 537, 275 App. Div. 974. See, also, *Berman v. Hudson American Co.*, 65 N.Y.S. 2d 676, 271 App. Div. 847, appeal denied 296 N.Y. 1055, 71 N.E. 2d 777.

- (b) The provisions of the Defense Base Act are made expressly inapplicable in respect to the injury or death of a "member of the crew of any vessel." 42 U.S.C.A. 1654 (3).

Statutory use of the all-inclusive modifier "any" indicates that the word "vessel" is not to be given a restricted significance, but is rather to be understood in its broadest sense. Thus, its meaning must be taken to include those vessels which navigate in the air as well as the water. Standard dictionaries define the term "vessel" as including aircraft. See, for example, Webster's Unabridged, 1961 edition, at page 2547, or the latest edition of the American College Dictionary.

It will be conceded that the deceased employee was a member of the crew of the ill-fated craft which disappeared on March 16, 1962; and it is obvious that the language of the statute is sufficiently explicit, since it refers to *any* vessel, to require the exclusion of a crew member, whether his vessel be a ship of the sea or of the air.

We are aware of the statutes providing that the navigation and shipping laws of the United States, including any definition of "vessel" found therein, shall not be construed to apply to seaplanes or other aircraft. 46 U.S.C.A. 183; 49 U.S.C.A. 177, 401 et seq. We are, also, aware of the cases decided under these statutes and holding planes not to be "vessels" within their provisions. *Noakes v. Imperial Airways, Ltd.*, 29 F. Supp. 412; *Dollins v. Pan American Grace Airways*, 27 F. Supp. 487, 489.

Significance of the foregoing cases has been wiped out by the repeal of the statutes in question by 72

Stat. 806, effective August 23, 1958. This leaves untouched, however, court rulings which have held a plane to be a "vessel," for certain purposes, at least. *Gdynia-American Shipping Lines v. Lambros Seaplane Base, Inc.*, 115 F. Supp. 796; *Reinhardt v. Newport Flying Service Corp.*, 133 N.E. 371, 18 A.L.R. 1324.

We are aware also of section 3 of U.S.C.A. Title 1, which reads: The word "vessel" includes every description of water craft or other artificial contrivance used, or capable of being used, as a means of transportation on water. Despite the fact that this is based on the Act of July 18, 1866, 14 Stat. 178, we have been unable to find any case which holds that the term "vessel," by reason of this section, does not include aircraft.

The Death On The High Seas Act (46 U.S.C.A. 761) provides a cause of action for wrongful death against the responsible "vessel, person or corporation." The courts have had no difficulty in construing "vessel" to mean an airplane. *Sierra v. Pan-American World Airways, Inc.*, 107 F. Supp. 519; *Lacey v. Wiggins Airways, Inc.*, 95 F. Supp. 916; *Wyman v. Pan-American World Airways, Inc.*, 43 N.Y.S. 2d 420.

Even before the repeal of the Air Commerce Act (46 U.S.C.A. 183; 49 U.S.C.A. 177, 401 et seq.) the federal courts laid down the rule that statutes containing a restricted definition of the term "vessel" must be interpreted in the light of their special purposes. For example, Judge Goodman had the following to say:

“Plaintiff further urges that, even if the Death On The High Seas Act, in its inception, afforded a right of action for deaths resulting from airplane crashes on the high seas, such deaths have been removed from its ambit by the Air Commerce Act of 1926. . . . Section 7 of that Act provides that the navigation and shipping laws of the United States, including any definition of ‘vessel’ or ‘vehicle’ found therein and including the rules for the prevention of collisions, shall not be construed to apply to seaplanes or other aircraft or to the navigation of vessels in relation to seaplanes or other aircraft. The purpose of the Air Commerce Act of 1926 was to foster civil aviation by establishing federal aids to navigation and federal safety regulations. . . . Section 7 was intended to prevent any conflict between the existing federal regulations respecting the navigation of vessels and those to be promulgated respecting the navigation of aircraft. The term ‘navigation and shipping laws’ as used in Section 7 of the Act obviously refers to those federal laws specifically governing the navigation and operation of the merchant marine. The term was never intended to include a general admiralty statute such as the Death On The High Seas Act.” *Wilson v. Transocean Airlines*, D.C. Cal. 1954, 121 F. Supp. 85, at page 93.

Inasmuch as dictionary synonyms for “any” include “every” and “whatever or whichever it may be” (see American College dictionary), it follows that “any vessel” (as we find it in 42 U.S.C.A. 1651 (3)), can properly be taken to mean “every vessel, whatever it may be.” Taken in conjunction with the various court

decisions which treat an airplane as a vessel (and in the fact that contrary decisions were based on statutes repealed in 1958), an employee who is a member of the crew of a transoceanic transport plane must validly be regarded as a member of the crew of a vessel. As such, he is *not* within the coverage of the Defense Base Act, and the deputy commissioner was without jurisdiction to make the decision which he issued in this case.

II.

REGARDLESS OF WHETHER A VALID AWARD UNDER THE DEFENSE BASE ACT COULD BE MADE UNDER ORDINARY CIRCUMSTANCES, NEVERTHELESS A PRIOR DECISION ON THE SAME ISSUE BY A STATE TRIBUNAL IS RES JUDICATA.

As to a litigated matter within the jurisdiction of an industrial accident board, a final award if not appealed from has the same conclusiveness and binding effect as the final judgment of a court. *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 64 S. Ct. 208, 88 L. Ed. 149; *Ocean Accident & Guarantee Corp. v. Pruitt*, 58 S.W. 2d 41; *General American Casualty Co. v. Rosas*, 275 S.W. 2d 570; *Traders & Gen. Ins. Co. v. Baker*, 11 S.W. 2d 837.

The case of *Mike Hooks, Inc. v. Pena*, 313 F. 2d 696, states at page 700:

“ . . . With recognition that a State cannot impose state workmen’s compensation on an injured interstate railroad worker, the Supreme Court nevertheless implied the doctrine of *res judicata*

to foreclose a subsequent Federal Employers' Liability Act suit where the state compensation tribunal in an adversary proceeding determined that the employee was engaged in intrastate employment. *Chicago, R. I. & P. Ry. v. Schendel*, 270 U.S. 611, 616, 46 Sup.Ct. 420, 70 L. Ed. 757."

The "Memorandum On Behalf Of Defendant Deputy Commissioner" states, at lines 14-21 of page 12, the following:

"To date, no court has held that a claimant's pursuit of a State compensation remedy precludes, as an election, his entitlement to receive the larger Federal compensation. As pointed out in *Mike Hooks, Inc. v. Pena*, 313 F. 2d 696, 700, n. 21 (C.A. 5, 1963), even with respect to subjects that might conceivably lie within the jurisdiction of a State tribunal in this area, 'the most that the earlier [State] decision does is to require proper credit', that is, credit in the Federal proceedings for what the earlier adjudication has granted."

The Memorandum then proceeds to list the six citations which follow the above quotation in the *Hooks* opinion, *supra*, and to quote excerpts from two of the opinions which in turn cited two additional cases supposedly supporting the foregoing statements.

The fact is that even the *Hooks* case itself does not provide support for the contentions of the defendant. Rather, it indicates, albeit by way of dictum, that the court regarded the prior decision by the state workmen's compensation tribunal as *res judicata* be-

tween the employee and the carrier; but as between the employee and employer, the former was not foreclosed from filing a Jones Act suit against the latter, since the employer was not a real party in the proceeding before the Texas Industrial Accident Board.

The material cited from footnote 21 on page 700 of the *Hooks* opinion, *supra*, leaves the impression that the holding of the court in that case was to the effect that "the most that the earlier (State) decision does is to require proper credit" in the federal proceedings for what the earlier adjudication had granted. What the footnote actually says (after citing a total of six cases) is that "On them a substantial argument *may* be marshalled that in this area the most that the earlier decision does is to require proper credit." (Emphasis added.) The various cases thus cited lend dubious support to defendant's position that nothing in the way of an earlier decision can preclude subsequent action by a deputy commissioner. Let us review them to determine their precise significance:

In two of the cases cited, there had been neither payment nor decision under the state law: *Flowers v. Travelers Ins. Co.*, 258 F. 2d 220; *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114.

In three of the cases, there had been voluntary payments under the state law, but no claim filed or award made: *Lawson v. Standard Dredging Co.*, 134 F. 2d 771; *Massachusetts Bonding Ins. Co. v. Lawson*, 149 F. 2d 853; *Kibadeux v. Standard Dredging Co.*, 81 F. 2d 670.

In the remaining three cases, either an agreement between the parties had been rubberstamped by state commission action, *Newport News Shipbuilding & Dry Dock Co. v. O'Hearne*, 192 F. 2d 968; *Gahagan Const. Co. v. Armao*, 165 F. 2d 301; or the claim which had been filed, though tentatively allowed, was still under investigation, *Western Boat Building Co. v. O'Leary*, 198 F. 2d 409.

None of the foregoing rise to the dignity of a precedent in reference to the present case, in which a formal hearing was held before the state tribunal, issues were raised and adjudicated, an award of benefits was made to the claimants, and such award was paid in full before the filing of a claim with the federal deputy commissioner.

It is true that the Longshoremen's and Harbor Workers' Compensation Act provides (33 U.S.C.A. 915(b)) that "no agreement by an employee to waive his right to compensation under this Act shall be valid." However, in the present case there was neither an agreement or a waiver, so far as we are aware, either by the employee or anyone else. We, therefore, see no relevance of this section of the Act to a situation where the claimants have elected to seek a state, rather than a federal, remedy.

It is also true that the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C.A. 916) provides that no assignment or release of benefits under that Act shall be valid. But we fail to see its applicability to the facts of the present case. Here, there

has been no assignment of benefits, express or implied. Nor has there been a release of benefits, except by a tortured interpretation of the word "release". The claimants simply, and very properly, elected to avail themselves of state benefits, undoubtedly convinced that they were in the proper forum until prevailed upon, directly or indirectly, by federal authorities to bring their claim to that tribunal.

III.

ASSUMING, WITHOUT CONCEDED, THAT OUR PRIOR CONTENTIONS ARE NOT VALID, WE SUBMIT THAT THE CARRIER IS ENTITLED TO FULL CREDIT FOR THE AMOUNT OF THE STATE COMMISSION AWARD, WHEN SUCH AWARD HAS BEEN PAID IN FULL BY THE CARRIER.

As indicated in our "Complaint For Injunction" (see page 5, lines 7-11), "Counsel for the plaintiffs asked for credit in the full amount of \$17,500.00, on the ground that this was the amount awarded under the state law, which amount had been satisfied by commutation to a present value of \$16,819.91." Nevertheless, by the award herein of the deputy commissioner, credit was given to the plaintiff carrier only for the lesser amount.

Precedent requires that the carrier be granted credit by the deputy commissioner for payment under the state award. *Lawson v. Standard Dredging Co.*, 134 F. 2d 771. However, the "Memorandum On Behalf Of Defendant Deputy Commissioner" (at page 13 thereof) contends that "credit is given for actual

payment . . . not for the mere award which might never in fact be paid." This is a contention which might be raised in regard to an unpaid award; but the record in the present case shows that the award of the state commission has been paid in full. The face amount of that award was \$17,500.00 and it was satisfied, not only in full, but expressly in conformity with the orders issued by the commission itself.

Cited by the "Memorandum On Behalf Of The Defendant Deputy Commissioner" as further support for his failure to allow full credit is the case of *Globe Indemnity Co. v. Calbeck*, 230 F. 2d 14 (see page 13 of the Memorandum). An examination of the facts of that case makes it plain that credit had been requested only for the net amount of payments by the carrier. The court's opinion says, at page 17, "nor did they request such credit at page 77 of the transcript." In the present case, counsel for the plaintiffs expressly requested credit for the full \$17,500.00 which had been satisfied by the carrier through payment in conformity with commission orders.

RECAPITULATION

We respectfully contend that the decision of the deputy commissioner is not in accordance with law for the following reasons:

- (1) It is in excess of his jurisdiction under either the Longshoremen's Act or the Defense Base Act;
- (2) The prior decision of the state commission is res judicata; and

(3) Even if the foregoing contentions are not upheld, the carrier should have been granted full credit for the amount of the state award, the latter having been satisfied in full.

Wherefore we urge that the motion for summary judgment and for a dismissal of our complaint be denied, and that the order and award of the deputy commissioner be vacated, annulled and set aside.

Dated, September 13, 1965.

HANNA & BROPHY,

Attorneys for Appellants.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WARREN L. HANNA,

Attorney for Appellants.

(Exhibits Follow)

Exhibits.

FLYING TIGER LINES, INCORPORATED,
and
EMPLOYERS MUTUAL LIABILITY INSUR-
ANCE COMPANY OF WISCONSIN,
Plaintiffs,
vs.

PETER GREGORY THOMAS, MAUREEN
ALTAIR THOMAS, and TERRY AVA
THOMAS, Minor Children of Gregory
Peter Thomas, Deceased,
Defendants.

James P. Welsh, Clerk.

Exhibit B

In the United States District Court
for the Northern District of California,
Southern Division

Civil No. 42747

FLYING TIGER LINES, INCORPORATED,
and
EMPLOYERS MUTUAL LIABILITY INSUR-
ANCE COMPANY OF WISCONSIN,

Plaintiffs,

vs.

DAVID R. LANDY, Deputy Commissioner
for the 13th Compensation District,
and

PETER GREGORY THOMAS, MAUREEN
ALTAIR THOMAS, and TERRY AVA
THOMAS, Minor Children of Gregory
Peter Thomas, Deceased,

Defendants.

JUDGMENT

This action came on for hearing on a Motion for Summary Judgment before the Court, Honorable Albert C. Wollenberg, District Judge, presiding, and the issues having been presented and a decision having been duly rendered,

It Is Ordered And Adjudged that the compensation order of the Deputy Commissioner be and the same hereby is affirmed and that the action be dismissed on the merits.

Dated at San Francisco, California, May 17, 1965.

/s/ Albert C. Wollenberg

United States District Judge

Cecil F. Poole, United States Attorney

John F. Meadows, Attorney in Charge,

West Coast Office, Admiralty & Shipping Section

Alexander Karst, Attorney, Admiralty

& Shipping Section, Dept. of Justice

By /s/ Alexander Karst

Alexander Karst

Attorneys for Defendant David R.
Landy.

Approved As To Form:

Hanna & Brophy

By /s/ Warren L. Hanna

Warren L. Hanna

Attorneys for Plaintiffs.

Exhibit C

In the United States District Court
for the Northern District of California,
Southern Division

Civil No. 42747

FLYING TIGER LINES, INCORPORATED,
and
EMPLOYERS MUTUAL LIABILITY INSUR-
ANCE COMPANY OF WISCONSIN,
Plaintiffs,

vs.

DAVID R. LANDY, Deputy Commissioner
for the 13th Compensation District,
and

PETER GREGORY THOMAS, MAUREEN
ALTAIR THOMAS, and TERRY AVA
THOMAS, Minor Children of Gregory
Peter Thomas, Deceased,
Defendants.

ORDER GRANTING SUMMARY JUDGMENT

This is an action to enjoin and set aside an award of death benefits to the defendant children of Gregory Peter Thomas, deceased, by the defendant Deputy Commissioner. Defendant Deputy Commissioner moves for summary judgment on the ground that there is

no issue as to the material facts and as a matter of law he is entitled to judgment.

Plaintiffs argue: (1) the Deputy Commissioner lacked statutory jurisdiction to make the award; (2) the award was barred because of *res judicata*; and (3) the amount of the award was computed incorrectly.

I

The award was made pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, as amended, 33 U.S.C. 901 *et seq.*, as made applicable to employment at certain defense base areas and elsewhere by the Defense Base Act of August 16, 1941, as amended, 55 Stat. 622, 42 U.S.C. 1651-1654. The decedent was a pilot for plaintiff Flying Tiger Lines. While in the course of his employment the plane on which he was flying disappeared with all aboard somewhere between Guam and the Philippine Islands. The plane was transporting military personnel from Travis Air Force Base, California, to Tan Son Nhut Air Base, Saigon, Viet Nam, pursuant to a contract between Flying Tiger Lines and the government.

Plaintiffs argue that the Deputy Commissioner was without jurisdiction to make the award because the agreement between Flying Tiger Lines and the government was not a "public work" contract within the meaning of the Defense Base Act and even if it was since the decedent was a member of the crew of a "vessel" his death was specifically excluded from the provisions of that Act.

First, was the agreement a "public work" contract within the meaning of 42 U.S.C. 1651 (b) (1)? Yes.

Prior to 1958 "public work" meant "any fixed improvement or any project involving construction, alteration, removal, or repair for public use . . . including but not limited to projects in connection with the war effort. . . ." 56 Stat. 1035 (1942). On the basis of this wording the federal courts held that service projects not directly concerning "construction, alteration, removal, or repair" were within the definition. *Republic Aviation Corporation v. Lowe*, 69 F.Supp. 472 (N.Y. 1946), affirmed 164 F.2d 18 (C.A. 2, 1947). To clarify the meaning of "public work" in 1958 the definition was reworded to incorporate the interpretation of the courts. S.B. No. 1886, 85th Congress, 2nd Session. The definition now includes "any project, whether or not fixed . . . including . . . operations under service contracts and projects in connection with the national defense. . . ." 42 U.S.C. 1651 (b) (1).

The conclusion is therefore inescapable that Congress intended service contracts which did not directly provide for "construction, alteration, removal or repair" to be included within the definition of "public work." Plaintiffs' argument based on *ejusdem generis* is without merit. In this instance there is specific legislative history to guide interpretation and there is no need to resort to general rules of construction.

Second, was the decedent's death specifically excluded from the provisions of the Defense Base Act?
No.

The Defense Base Act excludes from its coverage "a master or member of a crew of any vessel." 42 U.S.C. 1654. The same provision appears in the Harbor Workers Act, 33 U.S.C. 903. The Defense Base Act gives persons who are subject to it the remedies of the Harbor Workers Act and it is a fair inference that the class intended to be excluded in both was the same. The purpose of the exclusion in the Harbor Workers Act was to retain for seamen the protection of the Jones Act. *Warner v. Goltra*, 293 U.S. 55, 159-60 (1934). Since protection under the Harbor Workers Act was exclusive, 33 U.S.C. 905, it was necessary to exclude those protected by the Jones Act in order to achieve this objective. *South Chicago Co. v. Bassett*, 309 U.S. 251, 256 (1939).

However, a pilot of an airplane is clearly not protected by the Jones Act. Consequently, there is absolutely no support in the legislative history for including "airplane" within the definition of "vessel" in 42 U.S.C. 1654.

II

Prior to filing of the federal claim a death benefit award was made to decedents minor children by the Industrial Accident Commission of California. Plaintiffs now argue that the Commission award was res judicata because a final award of an industrial accident board has the same effect as the final judgment

of a court. Undoubtedly the issue under state law between the parties was *res judicata*. However, plaintiffs have cited no authority for the proposition that claimants under the Defense Base Act can elect to pursue a state remedy in lieu of their federal remedy. In fact the federal law specifically declares that the federal remedy "shall be exclusive and in place of all other liability . . . under the workmen's compensation law of any state." 42 U.S.C. 1651 (c). Thus, whatever the result under state law, the federal remedy is exclusive and the state result is not *res judicata*. *Globe Indemnity Co. v. Calbeck*, 230 F.Supp. 9, 13 (1959).

III

The state award was \$17,500 payable at the rate of \$70 per week. After weekly payments aggregating \$4,270 had been made the unpaid balance of \$13,230 was commuted to its present value of \$12,549.91, and upon request and pursuant to an order of the California Industrial Accident Commission, the latter amount was paid over in a lump sum. In computing the amount of the federal award the defendant Deputy Commissioner credited plaintiffs with \$16,819.91, the actual amount paid over under the state award. Plaintiffs now argue that they were entitled to a credit of \$17,500 because this was the amount awarded under state law.

Once again plaintiffs have overlooked the fact that the federal remedy is exclusive. Credit for the amount already paid over is not given because an award was made by a state agency. Such credit is given because

he amount paid over should be treated as an advance payment on the federal liability. *Lawson v. Standard Dredging Co.*, 134 F.2d 771 (5th Cir., 1943). Consequently, credit was correctly given only for the actual amount paid.

Accordingly, the motion for summary judgment is hereby Granted.

Dated: March, 1965.

Albert C. Wollenberg,
United States District Judge.

Exhibit D

Hanna & Brophy
 444 Market Street
 San Francisco, California
 YUkon 2-6077
 Attorneys for Appellants

In the United States District Court
 for the Northern District of California,
 Southern Division

Civil No. 42747

FLYING TIGER LINES, INCORPORATED, and EMPLOYERS MUTUAL LIABILITY INSUR- ANCE COMPANY OF WISCONSIN, vs. DAVID R. LANDY, Deputy Commissioner for the 13th Compensation District, and PETER GREGORY THOMAS, MAUREEN ALTAIR THOMAS, and TERRY AVA THOMAS, Minor Children of Gregory Peter Thomas, Deceased, Appellees.	}
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NOTICE OF APPEAL

Notice is hereby given of an appeal in the above-entitled matter by Flying Tiger Lines, Incorporated

and Employers Mutual Liability Insurance Company of Wisconsin from the order of the United States District Court issued on May 24, 1965, by District Judge Albert C. Wollenberg, which was an Order granting Motion For Summary Judgment in Respect to Complaint For Injunction in respect to the award of a death benefit in favor of the appellees Thomas and David R. Landy, deputy commissioner for the 13th Compensation District, also an appellee herein.

Flying Tiger Lines, Inc., and Employers
Mutual Liability Insurance Company
of Wisconsin

By Hanna & Brophy

Attorneys for Appellants.

Filed July 16, 1965,

Frank Schmid, Clerk.

